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No. 95-15

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PORTLAND HOUSING AUTHORITY,
Petitioner

v.

JOHN DOE and JANE DOE,
Respondents

On Petition for Writ of Certiorari to the Supreme Judicial Court of Maine

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the opinion of the Respondent, the following question is presented:

Do federal laws requiring a local public housing authority to provide decent, safe, and sanitary housing to its residents preempt a state firearm preemption law which voids a lease provision banning the possession or display of a firearm on public housing authority property by tenants?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, John and Jane Doe, by and through their attorneys, respectfully submit that the Supreme Court should deny the Petition for *certiorari* because the case was properly decided as a matter of state law and that the Court does not have jurisdiction under 28 U.S.C. § 1257(a).

OPINION BELOW

The decision of the Maine Supreme Judicial Court in this case has been reported at 656 A.2d 1200 (Me. 1995).

STATEMENT OF JURISDICTION

Just as alchemists of old sought to change lead into gold by intoning a few magic words, so too does Petitioner seek to invoke the jurisdiction of the court under 28 U.S.C. § 1257(a) by re-characterizing the nature of this case from a simple matter of state contract law by wrongly asserting that "the validity of a state law is

drawn into question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States and, correspondingly, a title, right, privilege, or immunity is claimed under authority exercised pursuant to the Constitution and statutes of the United States." In fact, it is only Petitioner's illogical reading of the *Housing Act of 1937* that has drawn the validity of the Maine firearm preemption statute [1] into question.

The holding of Maine's Supreme Judicial Court is clear and succinct:

> "Because we conclude that the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011 (Supp. 1994), the lease provision, which is based on a resolution enacted by the PHA in 1975, is preempted by section 2011. Accordingly, we vacate the judgment without reaching the [state] constitutional issues advanced by the Does." *Doe, supra,* 656 A.2d at 1201.

Contrary to Petitioner's assertion, Respondents dispute that this holding invalidates "a state law [2] as being repugnant to the Constitution, treaties or laws of the United States," and, therefore, no title, right, privilege or immunity conceivably held by the Petitioner is called into question. For that reason, the Court should deny the Petitioner's petition for a writ of *certiorari* as failing the requisite requirements for jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The following facts were found by the Maine Supreme Judicial Court. The Public Housing Authority (PHA) is a municipal housing authority created pursuant to 30-A M.R.S.A. § 4721 (Pamph. 1994). In 1975, the PHA Board of Commissioners passed a resolution prohibiting

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[1] 25 M.R.S.A. § 2011 (Supp. 1994).

[2] The holding of the Maine Supreme Judicial Court invalidated a lease provision prepared by the Public Housing Authority—a municipal corporation. It did not invalidate any state law.

tenants from possessing firearms on PHA property. The firearms ban provision is a provision in the leases of all PHA tenants.[3] The Does are married and live in Sagamore Village, a PHA development. They have lived in PHA housing since 1981. John Doe is a veteran of the United States Marine Corps, a former federally licensed firearms dealer, and a licensed hunter in Maine. He works nights, and when he is away, Jane, who has used handguns for twenty-seven years and target shoots at a gun club, is fearful for her safety. In violation of the lease agreement, they own and possess hunting rifles and handguns. To remain in their home without the threat of having their lease terminated, the Does brought a declaratory judgment action seeking, *inter alia*, a declaration that the firearms ban in their lease is contrary to the Maine Constitution and therefore is void and unenforceable, and that the lease is preempted by state law regulating firearms.

The trial court found that the lease provision does not violate the sections of the Maine Constitution relied on by the Does: the right to keep and bear arms,[4] the right to defend life and liberty,[5] or the right to equal protection of the laws.[6] The court also concluded that the ban on the possession of firearms is not preempted by state law and, therefore, upheld the lease provision and denied the Does any relief. The Does appealed to the Maine Supreme Judicial Court which reversed and remanded, finding specifically:

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[3] The Does' lease agreement with PHA provides, "The Tenant's possession of or display of a firearm upon the premises is prohibited. A violation of this Section is grounds for automatic termination of this Lease."

[4] Me. Const. art. I, § 16.

[5] Me. Const. art. I, § 1.

[6] Me. Const. art. I, § 6-A.

> "Because we conclude that the PHA is a political subdivision within the meaning of 25 M.R.S.A. § 2011 (Supp. 1994), the lease provision, which is based on a resolution enacted by the PHA in 1975, is preempted by section 2011. Accordingly, we vacate the judgment without reaching the [state] constitutional issues advanced by the Does." *Doe, supra,* 656 A.2d at 1201.

This Petition for a writ of *certiorari* followed.

SUMMARY OF ARGUMENT

The petition alleges that the Maine preemption law (25 M.R.S.A. § 2011 (Supp. 1994)) is in conflict with, and superseded by the *Housing Act of 1937* (42 U.S.C.A. § 1404, *et seq.*) as that statute has been implemented by rules and regulations promulgated by the Department of Housing and Urban Development (HUD). Certain of these provisions are found at 24 C.F.R. §§ 960.204, and 966.4 (April, 1994).

Respondents submit that there is no conflict between the federal and state statutes, and furthermore, that the Congress never intended the *Housing Act of 1937* to become a vehicle to thwart the rights of states to pass on the question of firearms regulation as a matter of state law concern. Indeed, recent legislative enactments by the Congress make clear that not only has the Congress specifically disclaimed the authority to preempt state firearms laws,[7] but it has also vested even juveniles with the right to keep firearms in the home.[8]

Finally, to the extent that the Petitioner relies on the *Housing Act of 1937* as authority for the PHA to enforce federal mandates to "provide decent, safe, and sanitary housing to its residents," such reliance is misplaced. Where a federal interest is sufficiently strong enough to

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[7] 18 U.S.C. § 927.

[8] 18 U.S.C. § 922(x)(3)(D); section 110201 of the *Violent Crime Control and Law Enforcement Act of 1994.*

cause Congress to legislate, it must do so directly; it may not conscript state governments [or their political subdivisions] as its agents. *New York v. United States,* 112 S.Ct. 2408, 2429 (1992).

Respondents urge that this case was correctly disposed of by the Maine Supreme Judicial Court under applicable state law. Consequently, this Court need not, and should not, resort to a convoluted reading of the *Housing Act* in order to search out a federal right where none is needed to resolve the controversy.

ARGUMENT

As correctly noted in the opinion below, a federal statute—such as the *Housing Act of 1937*—preempts a state law only when Congress has explicitly stated its intention to preempt state regulation of a certain field. *Doe, supra* 656 A.2d at 1202, citing *Rozanski v. A-P-A Transp., Inc.,* 512 A.2d 335, 339 (Me. 1986), (quoting *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.,* 467 U.S. 461, 468, 104 S.Ct. 2518, 2522, 81 L.Ed.2d 399 (1984)). Nowhere in the *Housing Act of 1937* does Congress manifest an intent to preempt state regulation of public housing, and certainly the *Housing Act* does not indicate any intent on the part of Congress to exclusively occupy the field of firearms regulation.

Indeed, where Congress *has* regulated firearms (*e.g.,* pursuant to the *Gun Control Act of 1968,*[9] as amended), it has specifically *disclaimed* an intent to preempt state law:

> § 927. Effect on State Law. No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter,

[9] 18 U.S.C. § 921, *et seq.*

> unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. 18 U.S.C. § 927.

In addition, when Congress undertook to pass the *Firearms Owners' Protection Act of 1986,* (amending the *Gun Control Act*) it specifically included a declaration of legislative intent that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the *Gun Control Act of 1968,* that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.'" Pub. L. No. 99-308 (1986).

Simply put, Congress has never indicated any expressed or implied desire to preempt state regulation of firearms—either in the *Housing Act of 1937,* the *Gun Control Act of 1968,* or in any other federal statute. Thus, the Maine legislature had every right under its sovereign police power to enact statewide preemption as a matter of establishing and expressing that state's public policy on firearms and nothing in any federal statute supports the proposition that it is beyond the power of the Maine legislaure to do so. Certainly if the *Gun Control Act* does not establish federal preemption, the *Housing Act* most assuredly cannot be stretched to read to do so.

It appears that Petitioner is simply attempting to play the *Housing Act* as a federal "trump card" in an effort to circumvent the clear language of the state preemption statute which forbids political subdivisions of the State—including the PHA—from imposing localized firearms regulations. Such an attempt to stretch the powers dele-

gated to the states under the *Housing Act* would require that this Court undertake a reading of the Act which is not supported by the clear language of the statute.

Likewise, Petitioner claims the offending lease provision was adopted in the furtherance of a federal mandate to provide "decent, safe, and sanitary housing," and thus, that the lease provision is somehow, therefore, a manifestation of the will of Congress. Interestingly, however, just last year Congress specifically provided authority for even juveniles to possess firearms in the home for self-defense. Subtitle B (Youth Handgun Safety) of Title XI of the *Violent Crime Control and Law Enforcement Act of 1994* (*i.e.*, the "crime bill") prohibits the possession of a handgun or ammunition by, or the private transfer of a handgun or ammunition to, a juvenile. Exceptions to the general prohibition include "the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest." It would be strange, indeed, that Congress would expressly authorize all juveniles to possess firearms in the home under the provisions of the crime bill, while simultaneously allowing a local government to use the *Housing Act* to cloak itself in federal authority to ban whole classes of low-income adults from possessing firearms in their homes.

Finally, even Petitioner's factual underpinnings for promulgating the lease provision in the first place are suspect. Several reasons support the proposition that firearms do not make a residence inherently dangerous, but rather provide a safe and effective means of self-defense. When properly handled, firearms pose no inherent risk of death or injury. According to the National Safety Council's 1993 *Accident Facts*, firearms were responsible for less than 2 percent of all accidental deaths—ranking just behind "suffocations caused by ingested objects" and "medical misadventures," and just ahead of "natural environ-

mental factors" and "poisonings caused by gases and vapors." In fact, since 1930 the number of annual fatal firearms accidents has decreased 56%,[10] while the number of privately owned guns has quadrupled and the U.S. population has doubled. Based on NSC data, one is almost twice as likely to die from a "medical misadventure" than from a firearm accident.[11]

Firearms in the home also provide a very real and credible deterrent to crime, and, consequently, Petitioner's claim that banning firearms from public housing authority property will make residents safer is unfounded. A 1994 study conducted by Florida State University criminologist Gary Kleck estimates that law-abiding citizens lawfully use firearms as many as 2.5 million times a year for protection from criminals or would-be criminals.[12] Furthermore, a Department of Justice sponsored survey of over 1,800 convicted felons found that 40% of felons chose not to commit at least one specific crime for fear that the victim was armed, and 34% admitted to being scared off or shot at by armed victims.[13] Finally, Department of Justice victimization surveys show that protective uses of firearms lessens the chance that rape, robbery and assault attempts will be successfully completed and reduces the chances of injury to the intended victim.[14] Thus, residents of PHA housing would be "safer" with firearms than without them.

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[10] *Accident Facts, 1993 Edition*, National Safety Council.

[11] *Accident Facts, supra.*

[12] Gary Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Prob. 1 (Feb. 1988).

[13] Wright & Rossi, *Armed and Considered Dangerous, A Survey of Felons and Their Firearms*, p. 154 (Aldine de Gruyter, Hawthorne, NY, 1986).

[14] U.S. Department of Justice, Bureau of Justice Statistics, *Crimianl Victimization in the United States, 1992*, NCJ 145125, p. 86, table 77 (Washington, D.C.: U.S. Department of Justice, 1994).

CONCLUSION

When laid bare, this case amounts to nothing more than a simple contract case which certainly does not give rise to a jurisdictional claim under 28 U.S.C. § 1257(a). A lease provision has been invalidated, not a state statute.

The Supreme Judicial Court of Maine has found that as a matter of state law the Portland Housing Authority—as a municipal corporation created by the state—does not have authority to include a lease provision which bans the possession or display of firearms in the home by residents of public housing, and ordered that the offending provision be stricken from the leases of PHA tenants. Such a decision reflects a fair interpretation and application of Maine's firearm preemption law enacted as a matter of public policy by the Maine legislature.

The Portland Housing Authority, however, claims that federal law, namely the *Housing Act of 1937*, gives it the authority to completely disregard this expressed will of the state legislature and that the *Housing Act* further demands that the PHA ban firearms for the safety of public housing tenants. Such an assertion amounts to a gross display of paternal arrogance, and is not supported by either prior Congressional enactment or empirical evidence. If Congress wants to ban firearms from public housing projects, it must do so directly subject to the limitations identified by this Court in *United States v. Lopez*, 115 S.Ct. 1624 (1995). The fact that Congress has never indicated an intent or desire to preempt state firearms laws despite many forays into the field of firearms regulation, coupled with its pronouncement of less than a year ago that even juveniles have the right to possess firearms in the home, provides clear and ample evidence that Congress has not empowered the Portland Housing Authority to include this provision in its tenants' leases.

WHEREFORE, premises considered, Respondents pray that this Court will deny Petitioner the writ of *certiorari* to the Supreme Judicial Court of Maine.

Respectfully submitted.

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